182 (1)

Supreme Court, U.S.
FILED

No. 101077 MAR 1 - 2011

OFFICE OF THE CLERK

In the Supreme Court of the United States

JAMES W. SCHULTZ, ET AL.,
Petitioners,

v.

UNIVERSITY OF CINCINNATI
COLLEGE OF MEDICINE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Tenth Appellate District

PETITION FOR WRIT OF CERTIORARI

JOHN H. METZ
Counsel of Record
1117 EDWARDS ROAD
CINCINNATI, OHIO 45208
(513) 321-8844
metzlegal@aol.com

Counsel for Petitioners

March 1, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. May a state's constitutional grant of trial by jury be abrogated when the state purports to bestow sovereign immunity on private physicians who perform surgeries on private patients at private hospitals, because those private physicians also hold part-time faculty appointments at state medical schools and medical students are present for the private surgeries?

II. Whether Ohio courts can create a new "public policy" that anytime a physician "furthers a student's education" he "promotes the State's interest" (even by the mere presence, without more, of a student at a private surgery on a private patient in a private hospital) and is therefore immune from malpractice claims; and then apply that new public policy retroactively to destroy vested rights of medical malpractice victims?

III. Is Federal Due Process violated when a State retroactively applies new case law that extinguishes vested rights and leaves malpractice victims with no remedy?

IV. May a state deny a malpractice-injured patients the constitutional right of trial by jury by permitting privately-retained physicians, who perform surgeries on private patients at private hospitals, to claim "sovereign immunity" due to being part-time position faculty members at state medical schools without disclosing such status (as part of Informed Consent)?

V. Can an alleged State employee execute a sworn affidavit that his performance of surgery is an "outside activity" of his State contract and yet claim the contrary (that his surgery is part of his State duties) to later obtain "sovereign immunity" when sued?

VI. Whether a defense attorney's representation in a deposition, relied upon by opposing counsel, that immunity does not apply is binding upon a negligent physician who eleven years later claims "immunity" just prior to trial?

VII. Where Ohio statutes provide that candidates for judgeships who exceed the age of 70 before a judicial term commences are "incompetent" to hold such judgeships, does it violate federal due process and the constitutional right to trial by jury when Ohio appoints retired judges over the age of 70 years to the Ohio Court of Claims to sit as judges and sole finders of fact of claims in which "sovereign immunity" is claimed?

VIII. Does Ohio's "State officer or employee" scheme unconstitutionally deny certain tort victims equal protection of the laws under the Fourteenth Amendment and Seventh Amendment?

IX. Whether once a State provides for a "trial by jury" does the Seventh Amendment extend Federal enforcement of such right as a fundamental right of Due Process guaranteed by the Federal Constitution?

PARTIES

Petitioner is James W. Schultz (the now voiceless patient) and his wife, Julie Schultz.

Relator is the University of Cincinnati College of Medicine Ohio (Pursuant to Ohio Rev. Code § 2743.02(E) only state agencies and instrumentalities can be defendants in original actions in the Ohio Court of Claims.)

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 9

REASONS FOR GRANTING THE PETITION ... 9

I. Certiorari should be granted to decide: May a state's constitutional grant of trial by jury be abrogated when the state purports to bestow "sovereign immunity" on private physicians who perform surgeries on private patients at private hospitals, because those private physicians also hold part-time faculty appointments at state medical schools and medical students are present for the private surgeries? 9

II. Certiorari should be granted to determine whether Ohio courts can create a new "public policy" that anytime a physician "furthers a student's education" he "promotes the State's interest" (even by the mere presence, without more, of a student at a private surgery on a private patient in a private hospital) and is therefore immune from malpractice claims; and then apply that new public policy retroactively to destroy vested rights of medical malpractice victims? 9

III. Certiorari should be granted to determine whether Federal Due Process is violated when a State retroactively applies new case law that extinguishes vested rights and leaves malpractice victims with no remedy? 10

IV. Certiorari should be granted to determine whether a State can deprive citizens of the fundamental doctrine Informed Consent by allowing physicians to operate without disclosing their part-time employment status which destroys a patient's fundamental right to a trial by jury of the physician's negligence? 15

V. Certiorari should be granted to determined if an alleged State employee can execute a sworn affidavit that his surgery is an "outside activity" of his State contract and yet be permitted to claim the contrary (that his surgery is

part of his State duties) for the purpose of obtaining "sovereign immunity" when sued? 19

VI. Certiorari should be granted to determine whether an attorney's representation in a deposition if relied upon by opposing counsel is binding upon a negligent physician who later claims "immunity" eleven years later just prior to trial. 21

VII. Certiorari should be granted to determine whether where Ohio statutes provide that candidates for judgeships who exceed the age of 70 before a judicial term commences are "incompetent" to hold such judgeships, federal due process and the constitutional right to trial by jury are violated when Ohio appoints retired judges over the age of 70 years to the Ohio Court of Claims to sit as judges and sole finders of fact of claims in which "sovereign immunity" is claimed? 23

VIII. Certiorari should be granted to determine: Does Ohio's "State officer or employee" scheme unconstitutionally deny certain tort victims equal protection of the laws under the Fourteenth Amendment and Seventh Amendment? 24

IX. Certiorari should be granted to determine whether once a State provides for a "trial by jury," does the Seventh

Amendment extend Federal enforcement of such right as a fundamental right of Due Process guaranteed by the Federal Constitution? 28

CONCLUSION 29

APPENDIX

Appendix A: Decision, In the Court of Appeals of Ohio, Tenth Appellate District, (May 11, 2010) 1a

Appendix B: Decision, Court of Claims of Ohio, (September 1, 2009) 26a

Appendix C: Entry declining jurisdiction, The Supreme Court of Ohio, (September 29, 2010) 37a

Appendix D: Reconsideration Entry denying rehearing, The Supreme Court of Ohio, (December 1, 2010) 38a

Appendix E: Constitutional and Statutory Provisions

Ohio Const. art. I, § 2 . . . . 39a

U.S. Const. amend. XIV . . 39a

Ohio Rev. Code

§ 109.36(A)(1) 40a

§ 9.86 . . . . . 41a

§ 2743.02 . . . . . 41a

TABLE OF AUTHORITIES

Cases

Adamson v. California,
332 U.S. 46 (1947) 28

Albertson v. T.J. Stevenson Co.,
749 F.2d 223 (5th Cir. 1984) 21

Baer v. Chase,
392 F.3d 609 (3d Cir. 2004) 21

Barwick v. Celotex Corp.,
736 F.2d 946 (4th Cir. 1984) 20

Betts v. Brady,
316 U.S. 455 (1942) 28

Camfield Tires, Inc. v. Michelin Tire Corp.,
719 F.2d 1361 (8th Cir. 1983) 21

Clevenger v. Univ. of Cincinnati,
2009-Ohio-2829 ..... 5, 12, 14

Colantuoni v. Alfred Calcagni & Sons, Inc.,
44 F.3d 1 (1st Cir. 1994) 20

Darnell v. Target Stores,
16 F.3d 174 (7th Cir. 1994) 21

Davis v. Harness,
38 Ohio St. 397 (1882) 18

Duncan v. Louisiana,
391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491
(1968) 24, 28

Ferguson v. Ohio State Univ. Med. Ctr.,
No. 98AP-863 (Ohio Ct. App. June 22, 1999) .. 5

Franks v. Nimmo,
796 F.2d 1230 (10th Cir. 1986) 21

Grosjean v. Am. Press Co.,
297 U.S. 233 (1936) 28

Hackman v. Valley Fair,
932 F.2d 239 (3d Cir. 1991) 21

Hake v. Geo. Wiedemann Brewing Co.,
23 Ohio St.2d 65, 262 N.E.2d 703 (1970) 22

Hayes v. Oakridge Home,
122 Ohio. St. 3d 63, 2009-Ohio-2054 16

Heffern v. Univ. of Cincinnati,
No. C-1998-02988 (Ohio Ct. Cl. Aug. 14, 2000)
(judgment) 16

James G. Smith & Assocs., Inc. v. Everett,
1 Ohio App. 3d 118 (1981) 18

Johnson v. Zerbst,
304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461
(1938) 19

Jones v. Gen. Motors Corp.,
939 F.2d 380 (6th Cir. 1991) 21

Kaiser v. Flege,
No. 98-LW-5261, unreported (Ohio Ct. App. Sept. 22, 1998) 12

Kelley v. Rossi,
395 Mass. 659, 481 N.E.2d 1340 (1985) 15

Kennedy v. Allied Mut. Ins. Co.,
952 F.2d 262 (9th Cir. 1991) 21

Martin v. Merrell Dow Pharm., Inc.,
851 F.2d 703 (3d Cir. 1988) 20, 21

McDonald v. Chicago,
130 S. Ct. 3020 (2010) 28

Palko v. Connecticut,
302 U.S. 319 (1937) 24, 28

Perma Research & Dev. Co. v. Singer Co.,
410 F.2d 572 (2d Cir. 1969) 20

Powell v. Alabama,
287 U.S. 45 (1932) 28

Radobenko v. Automated Equip. Corp.,
520 F.2d 540 (9th Cir. 1975) 21

Reid v. Sears Roebuck and Co.,
790 F.2d 453 (6th Cir. 1986) 20

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749, 115 S. Ct. 1745,
131 L. Ed. 820 (1995) 2, 10, 15

Schloendorff v. Soc'y of N.Y. Hosp.,
211 N.Y. 125, 105 N.E. 92 (1914) 16

Sinskey v. Pharmacia Ophthalmics, Inc.,
982 F.2d 494 (Fed. Cir. 1992) 20

Smith v. Steinberg,
481 N.E.2d 1344, 395 Mass. 666 (1985) 15

State ex rel. Keefe v. Eyrich,
22 Ohio St. 3d 164, 489 N.E.2d 259
(1986) 3, 13, 23

Theobald v. Univ. of Cincinnati,
160 Ohio App. 3d 342, 2005-Ohio-1510 11

Theobald v. Univ. of Cincinnati,
111 Ohio St. 3d 541,
2006-Ohio-6208 ..... *passim*

Twining v. New Jersey,
211 U.S. 78 (1908) 28

United States v. McKeon,
738 F.2d 26 (2d Cir. 1984) 22

Van T. Junkins & Assocs. v. U.S. Indus. Inc.,
736 F.2d 656 (11th Cir. 1984) 21

Constitutional Provisions

Ohio Const. art. I, § 2 8
Ohio Const. art. I, § 5 ..... 8, 28
Ohio Const. art. I, § 16 ..... 1, 8, 28
Ohio Const. art. II, § 28 16
Ohio Const. art. VI, § 6 ..... 3, 23

U.S. Const. amend. VII 8, 24, 28
U.S. Const. amend. XIV 2, 8, 24, 28
U.S. Const. amend. XIV, § 1 . . . . . 2, 24
U.S. Const. art. I, § 10, cl. 1 16

Statutes

28 U.S.C. § 1257(a) 1
42 U.S.C. § 1983 17
Ohio Rev. Code § 9.86 . . . . . 4, 17, 25
Ohio Rev. Code § 109.36(A)(1) 26, 27
Ohio Rev. Code § 2743 2
Ohio Rev. Code § 2743.02 3
Ohio Rev. Code § 2743.02(E) iii
Ohio Rev. Code § 2743.03 . . . . . 3, 23
Ohio Rev. Code § 2743.03(B) 3, 13, 23
Ohio Rev. Code § 2743.03(C)(1) 3
Ohio Rev. Code § 2743.11 13

Rules

Ohio R. Civ. P. 1 22

Other Authorities

American Medical Association Judicial Counsel's Opinions and Reports, § 570 18

I-Team Preview: "Suit-Proof Physicians" http://www.wcpo.com/dpp/news/local_news/investigations/I-Team%3A-Suit-Proof-Physicians 14

OPINIONS BELOW

The relevant opinions in this matter were issued by the Ohio Court of Claims: *Schultz v. Univ. of Cincinnati Coll. of Med.*, 2008-06431, unreported, Sept. 1, 2009, App. 26a; the Tenth District Court of Appeals of Ohio: *Schultz v. Univ. of Cincinnati Coll. of Med.*, No. 09AP-900, 2010-Ohio-2071 (OHCA10, May 11, 2010), App. 1a; the Ohio Supreme Court, *Schultz v. Univ. of Cincinnati Coll. of Med.*, No. 2010-1099, unreported (Sept. 29, 2010) (refusal of jurisdiction) App. 37a; the Ohio Supreme Court, No. 2010-1099, unreported (Dec. 1, 2010) (denial of reconsideration), App. 38a.

JURISDICTIONAL STATEMENT

The Ohio Tenth District Court of Appeal's decision was issued on May 11, 2010. App. 1a. The Ohio Supreme Court denied discretionary review on Sept. 29, 2010 (unreported), App. 37a, and denied reconsideration on Dec. 1, 2010, App. 38a.

This Court has jurisdiction to issues decided by the Ohio Court of Appeal under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition addresses Ohio's constitutional guarantee of a "trial by jury" being denied by court-created pseudo-"sovereign immunity." Ohio law allegedly provides due process to its citizens guaranteed in the Ohio Constitution; "Article I, § 16 Redress in courts: All courts shall be open, and every person, for an injury done him in his land, goods,

person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Although Ohio has since passed legislation creating a "Court of Claims" (Ohio Rev. Code § 2743) this initial constitutional provision clearly waives any "sovereign immunity" and the only "courts" referred to in such constitutional provision is "All courts." Once having waived sovereign immunity the State of Ohio cannot deny citizens due process by relegating them to the court with no jury and manned by "incompetent" judges (as defined by Ohio law).

This petition also involves the issue that once a State provides a remedy for a wrong, the Federal XIV Amendment guarantee of due process prohibits the State from frustrating that right to said remedy by retroactive application of judicially-created "sovereign immunity." ("Amendment XIV (1868): Section 1. . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

This case presents that "hard case" called for in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 820 (1995), to address the inequitable results of retroactive application of new case law that destroys rights. As Justice Kennedy therein stated: "for the law in this area is, and ought to be, shaped by the urgent necessities we confront

when there is a strong case to be made for limiting relief despite the retroactive application of the law." One cannot imagine a stronger case than where patients are killed or severely injured and through subterfuge of the State and retroactivity are left with no remedy.

Ohio Rev. Code § 2743.02 states:

> State waives immunity from liability. (A)(1) The state hereby waives its immunity from liability, ... and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties.

The Ohio Court of Claims has exclusive original jurisdiction to determine immunity of claimed employees or officers. (Ohio Rev. Code § 2743.03) and consists of incumbent judges or "retired justices or judges" (Ohio Rev. Code § 2743.03(B) and Ohio Const. art. VI, § 6). This conflicts with the Ohio Supreme Court's holding in *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (Ohio 1986) which held that one is "incompetent" to run for election as a judge if over the age of seventy. Lastly, all civil actions "against the state shall be heard and determined by a single judge. (Ohio Rev. Code § 2743.03(C)(1).

STATEMENT OF THE CASE

Petitioner was a private patient of defendant Dr. Dunsker (of the Mayfield Spine Clinic). On January 13, 1997 defendant performed surgery on Petitioner's neck at The Christ Hospital, a private hospital (non-

State owned) in Cincinnati, Ohio. Post-surgery Petitioner's voice was permanently damaged and can now only speak in a soft whisper due to permanent damage to his recurrent laryngeal nerves that innervate the voice box. Defendant had to admit that the damage occurred during surgery. Petitioner timely filed a medical negligence claim against Dunsker and Mayfield in the Court of Common Pleas on July 7, 1998.

The case progressed through years of discovery (and several judges) and was finally set for trial for June 4, 2007. On May 23, 2007, (eleven days prior to trial) defendant surgeon filed a motion for a stay stating: "Defendants **now** assert ..immunity pursuant to R.C. § 9.86." [Emphasis added] (10-1/2 years after the malpractice)! In 2006 the Ohio Supreme Court issued *Theobald v. Univ. of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208, which changed the law. *Theobald* held that physicians who hold any educational position (even part-time) with a State institution (e.g. University of Cincinnati College of Medicine) they can claim to be a "State employee" immune from suit – even when operating on a private patient at a private hospital. The *Theobald* court also specifically held that the doctor had no obligation to disclose this clandestine secret "State-employee" relationship to the patient. And, as in this case, can wait until well after the statute of limitations has run to disclose this relationship – a tactic approved by the Ohio Supreme Court.

The trial court stayed the case while Petitioner then was forced to file this separate lawsuit in the Court of Claims of Ohio for a determination of "immunity" [which, as an affirmative defense, seems

illogical that the Petitioner would have to seek this determination]. Then once Petitioner filed the action (based on defendant's motion) defendant then claimed that Petitioner missed the statute of limitations in the Court of Claims. Defense claimed Petitioner should have filed in the Court of Claims by 1998 (8 years before *Theobald* became the law). There was no dispute that defendants never informed Petitioner of any employment connection with the State of Ohio.

Over the years, as the evolution of expansion of "immunity" occurred, the lower *Theobald* court admitted that *Ferguson v. Ohio State Univ. Med. Ctr.*, No. 98AP-863 (Ohio Ct. App. June 22, 1999), "took a somewhat different tact" where the "key issue" was whether the practitioner "saw the patient only is his capacity as an attending physician supervising residents" or "saw the patient as a private patient." That is why both counsel knew that immunity did not apply since Petitioner was a private patient in 1997. Such even led to the defense counsel's concession during defendant's deposition that "I doubt very much immunity applies in this case... I would assume that it does not apply in this case" [Dunsker deposition, pp.99-100]

The Court of Claims nonetheless granted defendant surgeon herein "immunity" even though he had no recollection of the resident or what the resident did or what "education" took place. A resident's name had been entered onto a nurse's note and that was good enough for the court. The court (as in other cases) just takes the defendant's word that a resident "always is" there (See: *Clevenger v. Univ. of Cincinnati*, 2009-Ohio-2829).

Petitioner's counsel argued the Constitutional issues in the Court of Claims (court of first instance):

> "...it's a retroactive application. That's why I'm saying, as I'm sure the Court realizes, back in those days, if you will, the issue was, was it a private patient or not. And I think the law at that time, and I should say the facts, indicate clearly this was a private patient at a private hospital in Cincinnati- which is another legal issue I've been battling for years in Cincinnati. That if I go to a private hospital, how can a resident with this clandestine residency that a private patient has no knowledge of, how that can violate, I think our basic constitutional right to have due process and have a jury trial, I don't think that's fair. [Court of Claims, Immunity Hearing, Aug. 13, 2009, T.p. 9].
>
> "I think the law is that the law must be applied when the law at the time of the incident. Otherwise, we would be having, I mean, why not drag a case out like this one 20 years until you get the law changed. That isn't fair to the parties. The relationship of the parties, I think, logically and legally must be determined at the time of the incident. And what subsequently happens cannot change the legal relationship between the parties.... Mr. Schultz had a right to sue...the legislature or the courts cannot take that away if it is vested... It is only fair to the parties since the relationship at the time of the incident must govern. Because otherwise that is to take away a right, a vested right which is unconstitutional....That's just fundamentally unfair, especially when that forecloses the

> litigant from a due process right to have a trial by jury, both under the United States Constitution and the Ohio Constitution." [Court of Claims, Immunity Hearing, Aug. 13, 2009, T.p. p.64-67].

The Court of Claims went further and granted defendant's motion and dismissed with prejudice Petitioner's claim entirely. The Court held that Petitioner should have filed a case against the State of Ohio (not defendant) in its Court of Claims by 1998 even though the *Theobald* case was not decided until 2006!

Petitioner's counsel argued in the Court of Appeals First Assignment of Error:

> "So the resulting effect is that every patient who undergoes neurosurgery in Cincinnati is denied their Constitutional right to a jury trial and in most cases any reasonable right to make any recovery (since these clandestine corporate agreements are not made known until the statute of limitations has passed).
>
> The Courts are our last guardian of our Constitutional rights, a duty which should not be quelled by a public policy to provide blanket "immunity" so as to 'allow universities to attract and compensate highly qualified clinical instructors.' [*Theobald* at p. 546]."

Petitioner also raised Constitutional issues in his Fourth Assignment of Error: The trial court erred to the prejudice of plaintiffs-appellants in applying the Ohio Court of Claims Act and *Theobald* to create an

unconstitutional denial of Due Process and Equal Protection of the laws. [T.d.37].

Appellants' appeal brief stated:

> This labyrinth of masqueraded mercenaries is unconscionable and violates the Ohio and Federal Constitutions of fundamental rights of due process; trial by jury and violates Equal Protection. (violative of the Ohio State Constitution, Article I, § 5 [Trial by Jury]; Article I, § 16 [Open Courts] and the United States Constitution Amend. VII [Right of trial by jury] and XIV [due process] and the right to "equal protection"[Article I, Section 2 of Ohio Constitution and U.S. Constitutional Amendment XIV].

Petitioner's Eight Assignment of Error also stated: The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint since such application of the law violates the Equal Protection of the laws guaranteed under the Ohio and Federal Constitutions. [T.d.37]

Petitioner's Ninth Assignment of error stated: The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint by applying the law retroactively. [T.d.37]

Nonetheless, the Ohio Court of Appeals upheld the trial court holding that it would have been "prudent" for counsel to have foreseen eight years into the future

and have filed a lawsuit in 1998 in the Court of Claims even though it was not the law at the time.

The Ohio Supreme Court declined jurisdiction and denied reconsideration.

ARGUMENT

REASONS FOR GRANTING THE PETITION

I. **Certiorari should be granted to decide: May a state's constitutional grant of trial by jury be abrogated when the state purports to bestow "sovereign immunity" on private physicians who perform surgeries on private patients at private hospitals, because those private physicians also hold part-time faculty appointments at state medical schools and medical students are present for the private surgeries?**

II. **Certiorari should be granted to determine whether Ohio courts can create a new "public policy" that anytime a physician "furthers a student's education" he "promotes the State's interest" (even by the mere presence, without more, of a student at a private surgery on a private patient in a private hospital) and is therefore immune from malpractice claims; and then apply that new public policy retroactively to destroy vested rights of medical malpractice victims?**

III. Certiorari should be granted to determine whether Federal Due Process is violated when a State retroactively applies new case law that extinguishes vested rights and leaves malpractice victims with no remedy?

In *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 820 (1995), Justice Kennedy stated in his concurrence: "When a hard case presents the question of our authority to deny relief in a retroactivity case, that will be soon enough to resolve it; for the law in this area is, and ought to be, shaped by the urgent necessities we confront when there is a strong case to be made for limiting relief despite the retroactive application of the law." This is that "strong case."

Here numerous victims of malpractice resulting in death or tragic existences have had the rug pulled out from under them by the Ohio Supreme Court's judicial activism. The court (not the legislature) determined that it would expand beyond what the law had previously been to now extend immunity to physicians even though getting privately paid for surgeries, thus shifting the cost of their negligence upon the taxpayers of Ohio.

Over the past twelve years the Courts of Ohio have issued a cascade of cases continually expanding "sovereign immunity" to protect negligent physicians in malpractice cases. The *Theobald* appellate court claims that cases since 1999 retreated from the financial factors and turned upon the "education factor." However, it was not until December 2006 when the Ohio Supreme Court issued *Theobald v.*

Univ. of Cincinnati, 111 Ohio St. 3d 541 (2006) that the "private patient" test was replaced by the "education factor" and expanded to when a physician "furthers education" in any manner he is "promoting the State's interest" and is therefore a State employee and provided immunity if there is any claim that a resident even has an "opportunity to observe." The court noted:

> [m]ost, if not all, Ohio state medical schools affiliate with separate corporations run and staffed by clinical faculty members to deal with the income generated from the clinical faculty members' practices. These corporations, or practice plans, employ the medical school clinical faculty and provide the majority of the clinical faculty members' salaries. Additionally, the practice plans are responsible for billing and collecting payments for the services the clinical faculty members provide as part of their practice of medicine....This arrangement allows universities to attract and compensate highly qualified clinical instructors while the practice groups or corporations, in turn, financially contribute to maintain the medical departments within the university.

So Ohio courts are in actuality bestowing "immunity" upon medical practice plan corporations to insulate physicians from malpractice claims at the expense of the State taxpayers. The *Theobald* appeals court specifically recognized that the University and the practice plans were "separate legal entities" but "their relationship was **sufficiently close**" that the practice-plan's employee is "an employee of the state for purposes of immunity." (*Theobald v. Univ. of*

Cincinnati, 160 Ohio App. 3d 342, 2005-Ohio-1510, 05-LW-1359, at ¶ 30). [Apparently converting corporation law to that of horse-shoes; "it's close"].

Defendant-surgeon herein performed 95% of his surgeries at Christ Hospital (the private non-State hospital). One hundred percent of his fees (from whatever source) went to the Mayfield practice plan pursuant to "an agreement with the university." In the record he testified that his charge was to be "responsible for the residents that rotated at The Christ Hospital." So how is any patient supposed to know about this "agreement" from another institution that works to take away their legal rights?

The Ohio courts have judicially recognized that "all attending physicians at UC Medical Center were, by definition, members of the faculty of the university." (*Kaiser v. Flege*, No. 98-LW-5261, unreported (Ohio Ct. App. Sept. 22, 1998)). The defendant Mayfield Clinic is the only neurosurgery residency program in Cincinnati [Ohio Court of Claims, Immunity Hearing, Aug.13, 2009, T.d. p.47, 57, l. p.19-21]. Consequently everyone undergoing neurosurgery in Cincinnati is automatically unknowingly deprived of their due process to bring a medical malpractice claim against the negligent neurosurgeon (as Petitioner herein).

The Ohio courts have even expanded this immunity when there is no evidence, granting "immunity" just on the assumption that a resident "always is" present. (*Clevenger v. Univ. of Cincinnati*, 2009-Ohio-2829, at ¶ 12)

Once a State grants a constitutional right to "trial by jury" it should not be eliminated in medical

malpractice suits by a court bestowing "sovereign immunity" as "state actors" to private physicians performing surgeries at private hospitals if they merely have, or claim to have in the vicinity a student-doctor from a State owned medical school.

This cloak of "state employee" eliminates any claim denies malpractice victims a right to a jury trial since it eliminates any claim against the negligent doctor. The only forum then available is the Ohio Court of Claims in which the only defendant is only state agencies or instrumentalities the State of Ohio. In such court there is no "trial by jury" (pursuant to Ohio Rev. Code § 2743.11). The finder of fact is, among others, appointed "retired" judges pursuant to Ohio Rev. Code § 2743.03(B). Most if not all of these judges are over the age of 70. However, judges over the age of 70 are considered "incompetent" and unable to run for public election. *State ex rel. Keefe v. Eyrich,* 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986).

Most appalling is that this new "policy" is now being retroactively applied to all pending cases including the case *sub judice* (which occurred in 1997). Petitioner herein and numerous other victims of malpractice are being retroactively denied a trial by jury and due process by this judicial activism of this State court. Going forward, this new court-created policy shifts the burden of paying for malpractice now to the taxpayers instead of the defendant's insurance company. [See: *Theobald v. Univ. of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208, Justice Pfeifer's dissent: ¶ 41, ¶ 42.]

Such policy is a legislative power and courts should not be legislating. Petitioner's case was filed in 1997,

yet was ruled in 2009 to have been time barred since he did not foresee the 2006 *Theobald* decision which removed such cases from the ordinary court system (which provides a trial by jury) to the State Court of Claims. This shocking state of affairs has been reported statewide by the media and one reporter won a statewide award for bringing this injustice to the Public's attention. (I-Team Preview: "Suit-Proof Physicians" http://www.wcpo.com/dpp/news/local_news/investigations/I-Team%3A-Suit-Proof-Physicians).

The *Theobald* case resulted in paraplegia and blindness; *Clevenger v. Univ. of Cincinnati*, 2009-Ohio-2829, resulted in death and the within case Mr. Shultz's loss of ability to talk. These are just several of the cases that have been taken up the appeals structure to have the Ohio courts shut the door in their face and deny any remedy. Numerous other malpractice victims are certainly without remedy now with this retroactive application.

Here, where a citizen seeks a "private" physician-surgeon; pays that surgeon and his medical entity for their work (does not pay the State of Ohio); has no inkling that the State is in anyway involved in his undergoing surgery at a "private" (non-State owned) hospital; he should not be secretly cheated out of his "due process" rights.

It would be analogous to you hiring a local builder to construct your dream home and pay him cash. The house crumbles to the ground. You sue him only to then learn that he has an agreement with the Russian government to have Russian students "observe" him and one might have (but not necessarily) been on your construction site. The courts hold that the contractor

therefore has "diplomatic immunity" and you learn that you should have sued Russia itself in the Hague, but your statute of limitations is gone. Is this the kind of "justice system" game that should be condoned in the United States of America?

Other courts have addressed this clandestine "loaned-resident" relationship between the State owned medical school and private doctors and have managed not to deprive their citizens of their Constitutional Rights to due process and a trial by jury. *Kelley v. Rossi,* 395 Mass. 659, 481 N.E.2d 1340 (1985); *Smith v. Steinberg*, 481 N.E.2d 1344, 395 Mass. 666 (1985).

This case provides this Court the hard case envisioned in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 820 (1995), to address the issue of retroactive application of new case law that clearly results in Constitutional violations of innocent victims' rights. No more "urgent necessity" can be envisioned than to stop the continuing injustice to Ohio's malpractice victims who are without remedy. This unconscionable and outrageous legal mousetrap must be ended.

IV. Certiorari should be granted to determine whether a State can deprive citizens of the fundamental doctrine Informed Consent by allowing physicians to operate without disclosing their part-time employment status which destroys a patient's

fundamental right to a trial by jury of the physician's negligence?

When a physician does not disclose his employment status with the State of Ohio to a patient, (by which works a denial of their trial by jury), such consent is not "informed" and is invalid and a breach of contract between the patient and doctor.

The Ohio Court of Claims held in *Heffern v. Univ. of Cincinnati* No. C-1998-02988 (Ohio Ct. Cl. Aug. 14, 2000) (judgment) informed consent is not "informed" if given under false pretenses [there the perpetrator impersonated a physician when he was not. Therefore, the patients did not give "informed consent" when it was based on false representations].

The right to determine one's consent to medical treatment has been clear since 1914:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon [*130] who performs an operation without his patient's consent, commits an assault. for which he is liable in damages." (*Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) - Judge Cardozo).

The Ohio Supreme Court in *Hayes v. Oakridge Home,* 122 Ohio. St. 3d 63, 2009-Ohio-2054, reiterated its "duty to defend the right to private contract." See U.S. Const. Art. I, § 10, cl. 1; Ohio Const. art. II, § 28.

Clearly here Petitioner did not contract to have his surgery done by the State of Ohio. Petitioner had no

idea that his surgery had anything to do with the State of Ohio. In fact, if the State of Ohio has undertaken this surgery it is clearly liable for an assault under the law. This can of worms can get even more interesting in that the State taking this position can open the door for lawsuits under 42 U.S.C. § 1983 for an intentional governmental assaults. Clearly with their legal position they cannot now claim that such was not "State action" for purposes of 42 U.S.C. § 1983 purposes. In fact a class action for every neurosurgery patient in Cincinnati might be the correct response to the defendant's house of cards if this Court does not stop this continued injustice.

Petitioner herein only gave "consent" for defendant (not the State of Ohio or defendant as State employee) to perform surgery. Therefore, Petitioner should not be denied his right to trial by jury against this negligent non-disclosing defendant particularly when he did not consent to such relationship.

The Ohio Supreme Court clearly fails to understand or appreciate the doctrine of "informed consent" when it held in *Theobald:*

> {¶ 32} The Theobalds also ask us to require a health-care practitioner to obtain informed consent from a patient, except in emergency situations, in order to assert the defense of personal immunity under R.C. 9.86. The statute does not require informed consent, and we will not read such a requirement into the statute. Instead, the Theobalds should direct this argument to the General Assembly.

Part of "informed consent" is full disclosure and is important to every Ohio patient. To accept a job under false pretenses is fraud. To be working for another "employer" while being paid by another is fraud. When a physician does not disclose his employment status with the State of Ohio to a patient that works a denial of their trial by jury such consent is not "informed" and is invalid and a breach of contract between the patient and doctor. The *American Medical Association Judicial Counsel's Opinions and Reports* [Section 570] state that the surgeon's obligation to the patient requires him to perform the surgical operation "in accordance with the terms of the contractual relationship." Under *Theobald* there is an undisclosed principle to the "contract.

When a physician does not disclose his principal to a third party, the physician himself is liable for any negligence, not the undisclosed principle.

> Where the principal is undisclosed, i.e., where neither the existence of an agency nor the identity of the principal is known to the third party. Here, the dealing is held to be between the agent and the third party, and the agent is liable. *James G. Smith & Associates, Inc. v. Everett* (1981), 1 Ohio App.3d 118; See *Davis v. Harness* (1882), 38 Ohio St. 397.

Ohio's disregard of Informed Consent implies that the patient unknowingly "waives" their right to a jury trial. However it has been well established that a citizen's waiver of a constitutional right must be knowing, intelligent, and voluntary. This court has held that courts must " 'indulge every reasonable presumption against waiver' of fundamental

constitutional rights." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). While many of these cases involve criminal matters, why should a law-abiding taxpaying citizen right to trial by jury be any less protected?

This entire scheme merely implicates the State of Ohio into aiding and abetting fraud upon the Citizens of Ohio to deprive them of their basic Constitutional Rights which demonstrates the need of this Court's intervention for the sake of the Constitution.

V. Certiorari should be granted to determined if an alleged State employee can execute a sworn affidavit that his surgery is an "outside activity" of his State contract and yet be permitted to claim the contrary (that his surgery is part of his State duties) for the purpose of obtaining "sovereign immunity" when sued?

The evidence in the case *sub judice* demonstrated that the operative report was blank and no mention of any resident assisting in this surgery. However, most troubling is defendant surgeon's affidavit in this case where he swears to the University of Cincinnati that his clinical medical services were an "outside activity." [Ohio Court of Claims, Immunity Hearing, Aug. 13, 2009: **Defendant Exhibit D**: "University of Cincinnati – Annual Report of Outside Activity for Full-time Faculty" a form required to be filled-out by State employees states:

> **"Summary of all outside activity (Please list and briefly describe. Include the organization or person for whom the**

> **activity was performed, an estimate of the total time spent over what period, and any use of University resources. Use extra sheets, if necessary.):**
>
> "From September 1, 1996 through August 31, 1997, I performed [sic] at various times clinical medical services for which I am licensed on behalf of the Mayfield Clinic, the practice plan corporation in conjunction with the Department of Neurosurgery."

Not only does this affidavit clearly, under oath, prove defendant's clinical medical services were "outside" of his employment as a State employee; but further it states that these "activities listed did not interfere with" his obligation as a full-time faculty member." Logically if defendant was actually performing his duties as a State employee teaching a resident, it need not be stated that it did not "interfere" with such duties, since it would be his duties.

Courts should not permit such blatant disregard for the sworn word. The Federal Courts have recognized the importance of upholding affidavit testimony by creating the "sham affidavit" approach. Since *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 577-78 (2d Cir. 1969) every federal court of appeals has adopted some form of the sham affidavit doctrine. *See Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992); *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 706 (3d Cir. 1988); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984); *Reid v. Sears Roebuck and Co.*, 790 F.2d

453, 460 (6th Cir. 1986); *Jones v. Gen. Motors Corp.*, 939 F.2d 380, 385 (6th Cir. 1991); *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir. 1994); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364-65 (8th Cir. 1983); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Albertson v. T.J. Stevenson Co.*, 749 F.2d 223, 228 (5th Cir. 1984); *Van T. Junkins & Assocs. v. U.S. Indus. Inc.*, 736 F.2d 656, 657- 59 (11th Cir. 1984).

However, the Third Circuit and other courts of appeals have adopted a more flexible approach. *See Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004), *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991), *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 705-706 (3d Cir. 1998); *see also Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991).

Here clear contradictory affidavit testimony is being mis-used to frustrate due process. This is a case where the Federal courts should protect the citizens' Constitutional rights of due process and prohibit such mockery by applying the sham affidavit doctrine to this situation. This contempt for the sworn word in our legal process is fundamentally unfair and to the Public appears to turns the legal system into nothing but a game. This country's highest court should not permit a State to continue to trifle and degrade our system of justice in such fashion.

VI. Certiorari should be granted to determine whether an attorney's representation in a deposition if relied upon by opposing counsel is binding upon a negligent

physician who later claims "immunity" eleven years later just prior to trial.

Statements by an attorney concerning a matter within his employment are admissible against the retaining client. (*United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984) [Accord: *Hake v. Geo. Wiedemann Brewing Co.*, 23 Ohio St.2d 65, 262 N.E.2d 703 (1970)].

Here Dr. Dunsker's counsel during his deposition when questioned about "immunity" responded: "I doubt very much immunity applies in this case... I would assume that it does not apply in this case" [Dunsker deposition, pp.99-100]

This also invokes the "professionalism" that all counsel must attend as part of our continuing legal education. If one cannot take the professional word of opposing counsel during a deposition, then what is the purpose of professionalism?

Further, if courts would now have us disregard our opponent's legal representation it would open a flood gate to wild-goose chasing issues that in fact have no place in the case which would be in direct contradiction to Ohio R. Civ. P. 1. The legal time and expense tacking down every possible theory, even if opposing counsel indicates it is not in the case would be a ridiculous system of litigation.

Lastly, we, as attorneys, are required to take continuing legal education in ethics and professionalism. If such courses on "professional" conduct" and ethics are not to be applied in the real world, then what is the purpose? Clearly Petitioners had a right to legally rely upon the legal

representations made by Dunsker's private counsel during the legal proceeding of the deposition that immunity "does not apply in this case." The lower courts to not find it waived were clearly in error and should be reversed under these circumstances.

VII. Certiorari should be granted to determine whether where Ohio statutes provide that candidates for judgeships who exceed the age of 70 before a judicial term commences are "incompetent" to hold such judgeships, federal due process and the constitutional right to trial by jury are violated when Ohio appoints retired judges over the age of 70 years to the Ohio Court of Claims to sit as judges and sole finders of fact of claims in which "sovereign immunity" is claimed?

The Ohio Court of Claims has exclusive original jurisdiction to determine immunity of claimed employees or officers. (Ohio Rev. Code § 2743.03) and consists of incumbent judges or "retired justices or judges" (Ohio Rev. Code 2743.03(B) and Ohio Const. art. VI, § 6). This conflicts with the Ohio Supreme Court's holding in *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986) which held that one is "incompetent" to run for election as a judge if over the age of seventy.

Due process must be seriously questioned when the only trier of fact is legally "incompetent." For the State of Ohio to entrust the complete fact finding to only one judge who is incompetent, makes it difficult for the citizens to trust that their most important cases are being provided due process.

"The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries." (*Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)). Here the one judge sitting as trier of fact in the Ohio Court of Claims is paid by the defendant, State of Ohio. That same objection in 1774 is no less of a concern today for fundamental fairness.

As recognized in *Palko v. Connecticut*, 302 U.S. 319 (1937) due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." 302 U.S. at 325. Such scheme created to Ohio can hardly be deemed such and should be declared unconstitutional due to its "incompetent" judges, questionable bias and lack of a jury.

VIII. Certiorari should be granted to determine: Does Ohio's "State officer or employee" scheme unconstitutionally deny certain tort victims equal protection of the laws under the Fourteenth Amendment and Seventh Amendment?

A statute that confers "special privileges or immunities" upon one class of persons to the exclusion of other Citizens is unconstitutional.

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9.86 Immunity of public officers and employees.

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

Effective Date: 03-13-1980

109.36 Defense of officers and employees definitions.

As used in this section and sections 109.361 to 109.366 of the Revised Code:

(A)(1) "Officer or employee" means any of the following:

(a) A person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state.

(b) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(c) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(d) A person who, at the time a cause of action against the person arises, is rendering

> medical services to patients in a state institution operated by the department of mental health, is a member of the institution's staff, and is performing the services pursuant to an agreement between the state institution and a board of alcohol, drug addiction, and mental health services described in section 340.021 of the Revised Code. [Effective Date: 04-09-2003]

When one reads these definitions in § 109.36(A)(1) involving State "officers or employees" it is apparent that three-fourths of the definition is dedicated to a special class of citizens; i.e. the medical and health care-providers. Why should these professions be treated differently than any other citizen in Ohio? When in reality it is providing a "immunity" to a special class of persons which limits or abridges the rights of victims of that class. Why should those injured by medical negligence be treated differently than those who are injured by negligent drivers of vehicles? The answer is that it Constitutionally should not. Such legislation is unconstitutional since, as it is applied in the *Theobald* line of cases, abridges an injured citizen's privileges and immunities and denies equal protection by providing immunity not available to other citizens of other occupations, other than medical. Again, why should victims of malpractice be treated differently than those injured by "motor vehicles" operated by State employees? There is no rational basis for making such a special "immunity." Since this involves the violation of a basic fundamental constitutional right it fails Constitutional review under the strict scrutiny test.

IX. Certiorari should be granted to determine whether once a State provides for a "trial by jury," does the Seventh Amendment extend Federal enforcement of such right as a fundamental right of Due Process guaranteed by the Federal Constitution?

As this court discussed "selective incorporation," in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), this case presents the question of whether the Due Process Clause of the Fourteenth Amendment makes the Seventh Amendment right to "trial by jury" binding on the States. Here the State of Ohio through its constitution provides "open courts" and "trial by jury" to its citizens. [Ohio Const. art. I, § 5; § 16]. Once a State provides those rights "of such a nature that they are included in the conception of due process of law," the Due Process Clause protects those rights against state infringement. See *Twining v. New Jersey*, 211 U.S. 78, 99 (1908); *Adamson v. California*, 332 U.S. 46 (1947); *Betts v. Brady*, 316 U.S. 455 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936); *Powell v. Alabama*, 287 U.S. 45 (1932).

As this court recognized in *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968), the First Congress of the American Colonies stated trial by jury as one of "the most essential rights and liberties of the colonists." The case *sub judice* exemplifies how unfair a government system is if it denies trial by jury to its citizens. This case is the perfect example to have the Federal courts guarantee one of the "most essential rights" by utilizing the Due Process clause to apply the Seventh Amendment right to States that have allegedly promised it to their

Citizens. Such a basic fundamental essential right cannot be illusory.

Certiorari should be granted on this issue because it is an important question of federal law that has yet to be clarified. To ensure that state tort law continues to play its proper role in holding wrongdoers responsible for their own acts and not foisting it upon taxpayers and denying fundamental rights this Court should intervene to correct these erroneous decisions.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this petition for write of certiorari should be granted.

Respectfully submitted,

John H. Metz [Ohio#0019039]
Counsel of Record
1117 Edwards Road
Cincinnati, Ohio 45208-3412
(513) 321-8844
Fax: (513) 321-6389
e-mail: Metzlegal@aol.com
Attorney for Petitioners